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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

SUE SUTER, et al.

v.

ARTIST M., et al.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, ASSOCIATION OF CHILD ADVOCATES, ASSOCIATION OF JUNIOR LEAGUES INTERNATIONAL, CATHOLIC CHARITIES USA, FAMILY SERVICE AMERICA, CHILDREN'S DEFENSE FUND, NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION, NATIONAL FOSTER PARENT ASSOCIATION, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Amici are organizations joined in their concern for the well being of children involved in the child welfare system. While their approaches and points of contact with these children vary widely, all amici are united in their conviction that enforcing the reasonable efforts requirement of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") is essential to serving the best interests of these children.

Amici represent a wide range of child welfare practitioners, consultants, and volunteers involved in the delivery of services to children in their own homes, in foster care, and in adoptive placements. Prior to the adoption of the AACWA, amici witnessed the tremendous harm caused to children by unnecessary or prolonged foster care placement, and many were actively involved in reforming the system by pressing for the enactment of the AACWA. Sadly, amici continue to witness the same harm to children where the AACWA is not implemented.

As organizations that work with children, families, and child welfare systems, amici are intimately familiar with the social work standards and principles incorporated in the reasonable efforts requirement. Because these principles govern amici's work every day, it is clear to amici that the reasonable efforts requirement constitutes a coherent, applicable standard against which child welfare services can be judged.

The American Association for Protecting Children, a division of the American Humane Association, is a national,

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[1]Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

nonprofit organization, founded in 1877, that is engaged in research, training, consultation, evaluation and public education regarding child abuse and neglect and its causes and effects on children and families.

The Association of Child Advocates ("ACA") is a national association which provides leadership and services to state and local child advocacy organizations in the United States. ACA has one hundred and nine member organizations in forty-four states.

The Association of Junior Leagues International is an organization of women, with a collective membership of nearly 200,000, committed to improving the community through the effective action of trained volunteers. These Leagues have a long-standing commitment to improving and expanding the provision of services to children and families.

Catholic Charities USA is a nationwide network of 1,200 agencies and institutions which provide a continuum of services to vulnerable children and families, including family support, adoption services, foster family care and a range of other residential care services.

Family Service America ("FSA"), founded in 1911, is dedicated to strengthening family life in North America through services, education and advocacy. FSA's network of 285 community-based, multi-service support agencies-- many of which have been providing services in their communities for over 100 years-- provide an array of services to families and children.

The Children's Defense Fund ("CDF") is national nonprofit advocacy organization that for 15 years has pursued reforms on behalf of children who are at risk of placement or already in the care of the child welfare system. CDF was

involved in the development and enactment of the AACWA, and has worked with state and local providers, legislators, organizations of foster parents and adoptive parents, and other child advocates for over a decade to see that its services and protections are implemented.

The National Black Child Development Institute ("NBCDI"), founded in 1970, has diligently endeavored to improve the quality of life for Black children and families. In 1980, NBCDI testified before Congress and worked on behalf of the AACWA.

The National Association of Social Workers ("NASW") is the largest association of professional social workers in the world, with over 135,000 members in 55 chapters throughout the United States and abroad. NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills.

The National Court Appointed Special Advocate ("CASA") Association is comprised of 452 programs which provide 19,000 CASAs, or volunteer Guardians ad Litem, to advocate for the best interests of 81,000 abused and neglected children in juvenile court proceedings. CASA volunteers provide information to assist the courts in determining if reasonable efforts were made by the child welfare agencies.

The National Foster Parent Association is an organization of 3,500 members representing over 100,000 foster parents nationwide who are caring for 407,000 children currently in the custody of child welfare systems across the country. The Association and its members have long been concerned that many child welfare agencies are not affording

children in their custody the protections and services to which they are entitled under the AACWA.

The North American Council on Adoptable Children is a coalition of adoptive parents and adoption professionals that has advocated, since its inception in 1974, for children who are waiting for adoption.

SUMMARY OF ARGUMENT

The Adoption Assistance and Child Welfare Act of 1980 ("AACWA") was enacted in response to extensive evidence that state child welfare systems were harming the very children they were designed to protect. In particular, child welfare experts were concerned that children were being placed unnecessarily in foster care in ever increasing numbers, and left to languish there for years without any coherent plan for their future. This increasing reliance on foster care was clearly detrimental to children. At a minimum, children were traumatized by their separation from their families; at worst, that psychological trauma left life-long scars, preventing them from developing healthy attachments or a healthy sense of self, even in adulthood. For most children, foster care guaranteed instability -- children moved from home to home, from school to school, from one set of neighbors and "siblings" to another. Foster care limbo, as it came to be known, deprived these children of a most basic need, a permanent family, whether biological or adoptive.

In enacting the AACWA, Congress intended to change these children's fates. Based on the standards articulated by child welfare specialists, Congress carefully crafted a set of basic requirements designed to alter the way states implemented their child welfare programs. Principle among these was the requirement that states make "reasonable efforts" to prevent the necessity of removing children and to

speed reunification of children where removal proved necessary. Along with additional requirements for case plans and judicial review, the reasonable efforts requirement was intended to protect children's best interests by ensuring that states would provide services to preserve biological families whenever possible, and would seek to reunify families as quickly as possible if removal was necessary. The AACWA also required that states attempt to find a new permanent home for a child as swiftly as possible if reunification proved impossible.

The statutory reasonable efforts requirement was derived from clear social work standards, and can be readily judged against these standards. Certain preconditions of any effective service delivery are well recognized in social work practice, and are clearly encompassed in the core of reasonable efforts.

The most important, and universally recognized, requirement of an adequate system is the immediate and ongoing involvement of a caseworker in every case requiring state intervention. A caseworker is the troubled family's life line. Without a caseworker, many children will be unnecessarily removed from home. Without a caseworker, a parent has no way of contacting a child in foster care, of developing a plan for change, of accessing needed services. Without a caseworker, minor problems can be transformed into crises. Even a brief gap in caseworker coverage falls below established social work standards, and cannot be characterized as reasonable.

Because the reasonable efforts requirement accords with, and can be measured against, basic, commonly held social work principles, it is neither vague nor unenforceable. And because enforcement of the reasonable efforts requirement is essential to the protection of children's best interests, amici

urge this Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

I. THE PROVISIONS OF THE AACWA ARE NEEDED TO PROTECT CHILDREN

A. The AACWA Was a Response to Inappropriate Use of Foster Care That Had Been Well-Documented by Child Welfare Experts

In order to understand the importance of the reasonable efforts provisions of the AACWA,[2] it is useful to examine the problems in the child welfare system that led to its passage. The AACWA grew out of "(s)tudies of the child welfare system which . . . highlighted a number of weaknesses in the operation of social services systems and in the provision of services to children and their families." T. Stein & G. Comstock, Reasonable Efforts: A Report On Implementation By Child Welfare Agencies In Five States, American Bar Association, National Legal Resource Center For Child Advocacy and Protection 1 (1987). These studies showed that many abused and neglected children were being harmed by a system that was supposed to protect their well-being. Of particular concern was the states' lack of efforts to prevent unnecessary foster care placements or to reunite children with their families. See, e.g., Children's Defense Fund, Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care (1978); National Commission

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[2] 42 U.S.C. § 671(a)(3), (15), requires a "plan . . . in effect in all political subdivisions of the State . . . [that] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."

on Children in Need of Parents, Who Knows? Who Cares? Forgotten Children in Foster Care (1978); A. Shyne & A. Schroeder, Administration for Children, Youth and Families, U.S. Dep't of Health, Educ. and Welfare, National Study of Social Services to Children and Their Families (1978); D. Fanshel & E. Shinn, Children in Foster Care: A Longitudinal Investigation (1978); Governor's Advocacy Council for Children and Youth, "Why Can't I Have a Home?" A Report on Foster Care and Adoption in North Carolina (1978); New Mexico Dep't of Human Services, In Limbo: A Study of New Mexico's Foster Care Children (1978); R. Gruber, Children in Foster Care: Destitute, Neglected . . . Betrayed (1979); C. Masem, Human Services Providers Ass'n of Ark., Child Welfare in Arkansas (1979); State Soc. Welfare Board, Calif. Health and Welfare Agency, Children Waiting: Report on Foster Care (1972).

1. Unnecessary Foster Care Placements

Beginning in the early 1960's, the number of children placed into foster care throughout the United States increased substantially. The increase reflected the growing number of reports of abuse and neglect and an escalating incidence of family breakdown. Child protection agencies often removed children from their families as a first step, rather than trying to work with families to resolve the problems threatening the well-being of their children. See Mnookin, Foster Care--In Whose Best Interest?, 43 Harv. Educ. Rev. 599, 602 (1973); T. Stein & G. Comstock, supra p. 7, at 1. As a result, the number of children in foster care due to child abuse or neglect grew from approximately 75,000 in 1963 to over 300,000 in 1980. See Besharov, The Misuse Of Foster Care, 20 Child Welfare 213, 218 (1986).

By the early 1970's, it had become clear that many children were being harmed, rather than helped, by their

placement in foster care. As John Bowlby, a world-renowned psychiatrist, had forewarned as early as 1950, separating children from their families is extremely traumatic to children, even children who have received less than adequate care. J. Bowlby, Child Care And The Growth Of Love 13-20 (2d ed. 1965). Bowlby emphasized that because most children -- even mistreated children -- are emotionally attached to their parents, any disruption of the parent-child relationship is, at a minimum, extremely painful to a child; moreover, such disruptions can impair permanently the child's ability to form future relationships and develop into a healthy adult. Separation from the natural family for any period of time may be damaging to the development of a child. See, e.g., C. Heinicke & I. Westheimer, Brief Separations (1965).

The ideas of Bowlby were reinforced and elaborated by Joseph Goldstein, Anna Freud, and Albert Solnit. In their classic book, Beyond The Best Interests Of The Child (1973), they stressed that a child's most basic psychological need is for continuous and stable care to promote successful development. Goldstein, Freud and Solnit continued to emphasize the risks of separation in their later work:

> To be orphaned without separation, to be forced to dismantle existing emotional ties and fashion new ones with hitherto unknown people, is no easy task for any human being. Children are especially unequipped for such losses.

J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 53-54 (1979).

Researchers also found that foster placement entails other psychological risks for children, all of which can leave permanent developmental scars. See Wald, State Intervention

on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 644-46 (1976). Many children blame themselves for the separation. N. Littner, Some Traumatic Effects Of Separation And Placement (1956). They may experience abandonment, rejection, fear, worthlessness, despair, humiliation and helplessness. R. Geiser, The Illusion of Caring: Children in Foster Care 35-38 (1973). Foster children also experience identity problems, conflicts of loyalty, and anxiety about their future. E. Weinstein, The Self-Image of the Foster Child 15 (1960).

In addition to concern over psychological harm associated with removal, experts in child welfare pointed out a number of other problems with the inappropriate use of foster care. They recognized that it is far easier to work with families when the child remains at home than when the child is in out-of-home care. See Gambrill & Wiltse, Foster Care: Prescriptions for Change, 32 Pub. Welfare No.3, 39, 40 (Summer 1974). Therapists are able to observe directly the types of interactions that lead to abuse, neglect, or family conflict and to design interventions that can alter both parent and child behavior. See S. Minuchin, Families of the Slums 244-297 (1967).

It also was pointed out that unnecessary placements strained the already limited resources of the child welfare system. See Wald, supra p. 9, at 645-646. Supervising children in foster care requires more caseworkers than supervising children at home, since services must be provided to both the biological and foster homes. Moreover, excessive and inappropriate use of foster placement lessens the capacity of the foster care system to respond appropriately when out-of-home placement is necessary. It becomes more difficult to find well-qualified foster parents and to offer them

appropriate supports. As a result, many children were being placed in inadequate settings, where they suffered further abuse and neglect. Id.[3]

In addition to documenting the harms of foster care, research by child welfare experts demonstrated that in many cases an immediate offer of services could have prevented removal. See Gambrill & Wiltse, supra p. 10, at 39-40; American Public Welfare Association, Standards For Foster Family Services, Standard XVIII (1975). Sometimes the parents only needed help in finding services, such as day care or suitable housing. In other instances, the availability of a homemaker or public health nurse would have prevented the need for removal.[4]

Often, the removal of children from their homes had little to do with either the children's safety or the service needs of their parents. In too many cases, no services were provided between the time of removal and a decision to return the child. The child was removed, and remained in care, merely because understaffed agencies were slow in investigating the safety of the home or in determining the type of services that would enable the parents to provide adequate care. These unnecessary placements were being paid for by federal dollars.

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[3] This remains a problem today. Ironically, the absence of adequate foster homes also sometimes results in children being left at home who should be placed in foster care. See Besharov, The Politics of Foster Care, The American Enterprise, Jan.-Feb. 1990, at 16.

[4] The lack of services that would prevent the need for removal continues to plague the child welfare system today. See Schuerman, Rzepnicki, Littell, & Budde, Some Realities in The Implementation of Family Preservation Services, in Conference Proceedings, Child Welfare Reform Experiments, American Enterprise Institute (Feb. 1991) [hereinafter cited as Schuerman].

Thus, in the years just prior to the passage of the AACWA, both practitioners and researchers in the child welfare community supported the conclusion that had been reached by the Children's Bureau of the United States Department of Health, Education and Welfare over twenty years earlier: "(W)henever possible, children should be permitted to remain in their own homes with services provided through probation or protective supervision." U.S. Department of Health, Education, and Welfare, Standards for Juvenile and Family Courts 81 (1956).

2. Foster Care Drift

In addition to unnecessary placements, experts pointed to another major deficiency in child welfare agency practice that threatened the well-being of children. Even in those cases where removal was appropriate, children were left to drift in foster care without either being reunified with their families or provided new, permanent families through adoption. See E. Sherman, R. Neuman & A. Shyne, Children Adrift In Foster Care (1973). Numerous studies demonstrated that while the foster care system was conceived of as a temporary expedient, foster placement generally proved to be far from temporary; the majority of children remained in foster care for years, in many cases for their entire childhood. H. Maas & R. Engler, Children In Need Of Parents (1959); D. Fanshel & E. Shinn, supra p. 8.

Moreover, many children were moved from foster home to foster home. Subjecting children to multiple placements severely jeopardizes their development. Every move requires the child to make the difficult adjustment to new caretakers, foster "siblings," new neighborhoods and, significantly, to new schools. Each move threatens to undermine the child's academic achievements. Of even greater concern to child development specialists, multiple

placements prevent children from developing the attachment to a nurturing, caring adult that is so crucial to a child's development. As two experts wrote in 1971, "(N)o child can grow emotionally while in limbo.... He cannot invest except in a minimal way ... if tomorrow the relationship may be severed." Bryce & Ehlert, 144 Foster Children, 50 Child Welfare 499, 503 (1971). See also Wald, supra p. 9, at 645-46.

As the evidence of foster care drift mounted, child welfare experts recognized that in order to provide foster children with permanent homes, they either had to be reunited promptly with their biological parents, or moved toward adoption after a swift determination that reunification would not work. Unfortunately, most child welfare agencies failed to make adequate (or any) efforts to reunify children with their parents; nor did they work towards adoption. See Wiltse & Gambrill, Foster Care, 1973: A Reappraisal, 32 Pub. Welfare No.1, 7 (Winter 1974); Children's Defense Fund, supra p. 7, at 5-9; National Commission on Children In Need Of Parents, supra p. 7, at 5-8.

To alleviate this situation, experts pointed to the essential need to make reasonable efforts at reunification. See American Bar Association -- Institute For Judicial Administration, Juvenile Justice Standards Project, Standards Related To Child Abuse And Neglect 131-134 (1977) [hereinafter cited as A.B.A.-I.J.A.]; Gambrill & Wiltse, supra p. 10, at 40-46. A requirement that reasonable steps be taken to promote reunification was regarded as critical to children for several reasons. First, early reunification is the best way of protecting the emotional well-being of many children, provided that the problems that resulted in removal are corrected. The majority of children placed in foster care mourn the loss of their family and eagerly await reunification. See T. Baily & W. Baily, Child Welfare Practice (1983). For

many children, no other caretakers can replace their parents, no matter how competent or caring the other caretakers.

Moreover, for some children reunification is the only available alternative to growing-up in a series of unstable foster placements. These are cases where, due to the child's age, emotional problems, or other characteristics, it is extremely difficult to find an adoptive home or a single, long-term foster placement. In these cases, absent reunification, the number of multiple placements greatly increases, causing further emotional damage to the child.

Less obvious, but equally important, reasonable efforts to reunify families is crucial even if such efforts prove unsuccessful. When parents are unable to change their abusive or neglectful behavior, even after they have received good treatment services, the best resolution for the child often is termination of parental rights, so that the child can be adopted by another family. However, judges and social workers are extremely reluctant, and indeed, may be barred by state law, from terminating parental rights, even in appropriate cases, unless efforts at reunification have been made. Terminations and subsequent adoptions were extremely rare in the period prior to the adoption of the AACWA, in part because many agencies failed to make adequate efforts at reunification.

In sum, prior to the passage of the AACWA there was overwhelming evidence that the child welfare system was not meeting the needs of children. Despite the consensus among experts in child welfare with respect to good practices, and the substantial evidence that these practices could be implemented successfully, see Emlen, The Development of the Concept of Permanency Planning, in Foster Care Reform In The 70's: Final Report Of The Permanency Planning Dissemination Project (Reg. Research Inst. Portland State University 1981);

Steketee, The CIP Story, 28 Juv. Just. No. 2, 4 (May 1977), the majority of agencies in the United States were not adhering to these practices. See Comptroller General of the United States, Children in Foster Care Institutions--Steps Government Can Take To Improve Their Care (1977).

While the federal government paid a large percentage of the costs of foster care and contributed to the costs of other child welfare services, the federal statutes did not require states to comply with practices generally accepted to be the minimum needed to protect children. Indeed, the AACWA's predecessor, Title IV-A of the Social Security Act, 42 U.S.C. §§601-615 (1976 & Supp. V 1981), encouraged substandard practices with its vague requirements and a reimbursement scheme favoring foster care. As a result, states had an economic incentive to overuse foster placement and to allow children to remain in such care indefinitely. It was this situation that the AACWA was designed to rectify.

B. The AACWA Was Designed To Alleviate These Problems

Both committee reports and floor statements during the AACWA's several-year development repeatedly recognized unnecessary foster care placements and foster care drift as the fundamental problems the statute was designed to remedy.[5] In first introducing the bill in the 95th Congress,

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[5] Contrary to the claims of petitioners, see Brief for Petitioners at 22-26, Congress clearly concluded that the evidence demonstrating the harms of placement justified a policy of trying to prevent placement, provided that this could be done without risking further harm to the child. There was no dispute among social work professionals that making reasonable efforts to preserve families was the best way of protecting children. This remains the view today. See infra pp. 18-22.

the lead House sponsor spoke of the importance of these problems and the need to redirect federal priorities:

> The issue is not whether we will spend Federal funds on these children and families, but when. We can either adequately support preventive service programs which can keep families together, or ignore the developing crisis and continue to pay hundreds of millions of dollars annually to maintain them in long term foster care, without any benefit to them or their families.

123 Cong. Rec. 9916 (March 31, 1977) (statement of Rep. Miller). See also 125 Cong. Rec. 22681 (August 3, 1979) (statement of Sen. Cranston) (arguing for "maintaining [children] with their own families or finding new adoptive families for them").

Upon passage, Senator Cranston contrasted the "very generalized" provisions of prior law with the "specific requirements that states must include in their Title IV-E program plan provisions to assure that in each case reasonable efforts be made prior to the placement of a child in foster

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Moreover, the substantive law of virtually every state explicitly recognizes that children should be removed only if removal is necessary to protect them from future harm. See, e.g., Cal. Welf. & Inst. Code § 361(b)(1) (Deering Supp. 1991) (no child shall be removed from home unless there is substantial danger to the child's health and there are no reasonable means that the child's health can be protected without removing the child); Minn. Stat. Ann. § 260.011(Subd.2)(a) (West Supp. 1991) (the purpose of the juvenile laws is to preserve and strengthen the child's family ties, removing a child from parents only when a child cannot be adequately safeguarded without removal). See also, M. Soler et al., Representing the Child Client, § 4.08(3)(b)(ii) (1991). Thus, the brief of petitioner sets up a false conflict between the AACWA and state laws.

care to prevent or eliminate the need for removal of a child from his home and that reasonable efforts be made to make it possible for a child to return" to the home. He described these provisions as "among the most important aspects of this legislation." 126 Cong. Rec. 14767 (June 13, 1980) (emphasis added).

Moreover, testimony before the Senate Committee on Finance emphasized that state agencies well understood the direction being considered by Congress and saw the demands created as manageable. The Commissioner for the New York State Department of Social Services, for example, testified about that state's policies which required an emphasis "on services to prevent or shorten foster care placement," and about standards being developed in the state to define the "minimum tasks and activities that agencies must undertake to assure sound planning for children in foster care." Among these practices were "intake procedures which emphasize services to avoid placement, planning for return to the family or other permanent arrangements...." Proposals Related to Social and Child Welfare Services, Adoption Assistance and Foster Care: Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance, 96th Cong., 1st Sess. 117 (1979) (statement of Barbara Blum, Commissioner, NY State Department of Social Services).

The requirements that were so central to the AACWA's overhaul of the foster care system were threefold: 1) that reasonable efforts be made to prevent removal or to reunify families as rapidly as possible; 2) that the supervising agency develop a case plan for each child in foster care, which details the efforts that are to be made towards these ends; and 3) that a permanency planning hearing be held within eighteen months of placement, so that children who cannot be returned to their parents will be provided a new permanent home.

42 U.S.C. §§671(a). Congress viewed each element as critical to a properly functioning child welfare system.

C. The Reasonable Efforts Requirement is Central to the AACWA's Goal of Furthering the Best Interests of Children.

The AACWA establishes an overall system of intervention that will protect the interests of children and families, if all of the elements are in place. The central goal of the AACWA is to ensure that states receiving federal funds adopt procedures designed to provide children with safe, secure and stable homes. Consistent with the research and clinical findings of child welfare professionals, the AACWA requires that child protection agencies first explore whether this safety and stability can reasonably be provided in the child's own home. When that proves impossible, the AACWA requires the system to focus on providing each child with an adoptive or other permanent home.

The reasonable efforts clause stands at the heart of this system. It is the base on which the requirements of case planning and permanency planning hearings are built. Case plans and review hearings are the tools that are used to try to get decision-makers to focus on each child's needs in an organized and timely fashion. But the actual protection of these needs occurs only if agencies make reasonable efforts with respect to preventing removal and facilitating reunification. Thus, the AACWA's highly structured process depends upon a system in which reasonable efforts are routinely made.

The procedures required by the AACWA reflected the best professional thinking with respect to social work practice. In fact, the AACWA "was the product of the study and work of prominent judges, law professors, attorneys, social work

professionals, and mental health professionals throughout the United States." American Bar Association, National Legal Resource Center for Child Advocacy and Protection, The Adoption Assistance and Child Welfare Act of 1980; An Introduction for Juvenile Court Judges 1 (1983). The requirements closely paralleled standards recommended by a multi-disciplinary national commission of child welfare professionals established by the American Bar Association to review the legal response to child abuse. See A.B.A.-I.J.A., supra p. 13.

These provisions also embodied the standards for protecting children recommended by the American Public Welfare Association and the Child Welfare League of America, associations that represent child welfare agencies throughout the country and that are dedicated to fostering high quality child welfare services. See, e.g., American Public Welfare Association, Standards For Foster Family Services, supra p. 11; Child Welfare League of America, Standards For Child Protective Service (1973).

Thus, amici totally disagree with the claims by petitioner that the provisions of the AACWA are in any way inconsistent with the best interests of children. "The Child Protective Service response to child abuse, neglect, and exploitation has as its fundamental purpose the protection of children through enabling parents to better fulfill their parenting role." Child Welfare League of America, Standards for Service for Abused and Neglected Children and Their Families 4 (1984); see also id. at 21. Congress required reasonable efforts precisely because it concluded, on the basis of expert testimony, that it is in children's best interests for agencies to explore whether a child can be protected in her or his home and whether reunification is possible if a child must be removed.

It must be recognized, moreover, that the reasonable efforts requirement does not require that a child be kept at home, or that a family be reunited. It is still up to the state court, applying state substantive standards, to determine whether a child can be maintained safely at home. The AACWA requires only that agencies consider whether, in light of a state's substantive law, removal can be prevented, or reunification facilitated, and that agencies make reasonable efforts to achieve those ends. Petitioners' implication to the contrary is thus not relevant to the issues in this case. See Brief for Petitioners at 23 n.10.

In fact, since the passage of the AACWA, the judgment of Congress that the well-being of children will be enhanced when states make reasonable efforts has been borne out by experience. It has been demonstrated, in recent years, that when the AACWA's structure is implemented, and child welfare agencies make reasonable efforts to provide appropriate services, the great majority of children who come to the attention of child welfare agencies can be kept safely at home. See T. Ooms & D. Beck, Keeping Troubled Families Together: Promising Programs and Statewide Reform, American Association For Marriage and Family Therapy (1990); J. Whittaker, J. Kinney, E. Tracy & C. Booth, Family Preservation Services: Research and Evaluation (1990). The states that have implemented new programs to prevent removal have demonstrated how effective reasonable efforts can be. See Center For The Study Of Social Policy, State Family Preservation Programs: A Description Of Six States' Progress in Developing Services to Keep Families Together (Working Paper FP-3) (1988).[6] And, just recently, two highly

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[6] In addition to the important benefits for children, quality in-home services are also cost-effective. See Smith, Family Preservation Services: State Legislative Initiatives, National Conference of State Legislatures 1 (1991); Child Welfare League of America, National Council of Juvenile and

prestigious national commissions studying the risks facing children and families have called for increased investments in services and programs designed to strengthen and preserve families and avoid the need for unnecessary foster care. American Public Welfare Association, National Commission on Child Welfare and Family Preservation, A Commitment to Change 5-7, 23-27 (1990); National Commission on Children, Beyond Rhetoric: A New American Agenda for Children and Families 296-301 (1991).

Unfortunately, despite the efforts of national organizations like amici, far too many jurisdictions still are failing to implement the basic mandates of the AACWA. Many children still are being removed unnecessarily because of the failure of agencies to make reasonable efforts to prevent removal. See, e.g., Chicago Bar Association, A Report to the President of the Chicago Bar Association (1989); Schuerman, supra note 4. Many children remain in foster care limbo because of agency failures to provide meaningful reunification services. See, e.g., National Black Child Development Institute, Who Will Care When Parents Can't? A Study of Black Children in Foster Care (1989); National Black Child Development Institute, Parental Drug Abuse and African American Children in Foster Care (1991); Select Comm. on Children, Youth and Families, U.S. House of Representatives, No Place to Call Home: Discarded Children in America (1990). And judges still are refusing to order termination of parental rights because agencies have not made reasonable efforts at reunification. See Office of

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Family Court Judges, Youth Law Center, and National Center for Youth Law, Making Reasonable Efforts: Steps for Keeping Families Together, 8 (undated) [hereinafter cited as Making Reasonable Efforts].

Inspector General, Department of Health and Human Services, Barriers to Freeing Children for Adoption (1991).[7]

Thus, the intent of Congress in enacting this statute is being thwarted. Even more significantly, from the perspective of amici, children are not receiving the services they need and to which they are entitled.

II. THE BASIC ELEMENTS OF REASONABLE EFFORTS ARE ROOTED IN COMMON UNDERSTANDINGS AND ARE READILY SPECIFIED

A. The Basic Concept

Petitioners' major argument in this case appears to be that the term reasonable efforts has no common meaning and therefore is not readily enforceable by a federal court. To amici, whose members work with this term every day, this claim is clearly wrong. The basic elements of a system for making reasonable efforts are neither vague nor unenforceable. They are specified in the standards of national organizations, such as the Child Welfare League of America ("CWLA") and National Association of Social Workers and

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[7] A recent 20-state survey by the Inspector General concluded that the states' failure to make reasonable efforts to reunite families "delays implementation of adoption plans for many children and prevents it for others.... Over 75% of the respondents in the state survey indicate that the inability of the child welfare agencies to meet the 'reasonable efforts' standard to the satisfaction of the state courts in a timely manner is the primary barrier to implementing permanent plans of adoption." Office of Inspector General, supra p. 21 (emphasis in original). In fact, under many state statutes, judges may be precluded from terminating parental rights unless it is proven that reasonable efforts at reunification were made and failed. See, e.g., Conn. Gen. Stat §§ 17-43a(b) (1989); Mo. Ann. Stat. §§ 211, 447 (Vernon 1991).

are well-defined in professional literature. See, e.g., CWLA, Standards for Child Protective Service (1973); CWLA, Standards for Organization and Administration for all Child Welfare Services (1984); CWLA, Standards for Own-Home Service (1984); CWLA, Standards for Foster Family Service (1986); CWLA, Standards for Service for Abused or Neglected Children and Their Families (1989); National Association of Social Workers, NASW Standards for Social Work Practice in Child Protection (1981) [hereinafter cited as NASW Standards]; Making Reasonable Efforts, supra note 6; T. Stein, Child Welfare and the Law (1991).

In essence, in order to make reasonable efforts to prevent removal, a child welfare agency must do three things before removing a child from her or his home:[8]

1. Identify the factors that are placing the child at risk of further abuse or neglect, that is, the factors that might necessitate removal;

2. Explore whether there are services that could be provided to the parents and/or child that would reduce the risk to the child to a point where it would be safe to leave the child at home;

3. Offer such services to the family, when such services can be reasonably provided. CWLA, Standards for Service for Abused or Neglected Children and Their Families, supra, at 9.

Reasonable efforts at reunification require the agency to:

1. Identify those factors that must be changed in order for the child to be returned to the parents;

2. Identify the services that are needed to help the parents accomplish these changes;

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[8] These actions are not required prior to placement in emergency situations, where the child is threatened with serious imminent harm unless placed.

3. Develop a case plan for providing these services;

4. Offer such services to the parents, to the extent that they can be reasonably made available, and facilitate the delivery of the services.

The exact services needed to prevent removal, or to facilitate reunification, will, of course, vary from one individual case to another. The decision as to the reasonableness of the specific services is decided by the juvenile court judge in each case.[9] However, in every case it is essential that there be a professional social worker assigned to the case; without a caseworker there can be no reasonable efforts. It is the caseworker who is responsible for developing and administering the case plan for preventing removal or facilitating reunification; the case plan is both a requirement of the AACWA and the linchpin of any agency efforts to work with families. CWLA, Standards for Organization and Administration for all Child Welfare Services, supra p. 23, at 68; B. McGowan & W. Meezan, Child Welfare: Current Dilemmas, Future Directions 26 (1983).

Moreover, in order to prevent unnecessary removals, this worker must be available from the time the agency begins its investigation. And in order to make reasonable efforts at reunification, continuous casework attention to the needs of the child and family is essential. While these elements are not all-inclusive, they are central to the case before this Court.

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[9] The service mix that each state chooses to fund might also vary; the mix should be related to the needs of families in a particular state. Thus, with regard to the appropriate service mix provided by the states, amici do not disagree with the view expressed by Amici Louisiana, et al., that some aspects of what constitutes reasonable efforts will vary state by state. Brief for Amici States of Louisiana, et al. at 8-9. However, the specific elements at issue in this case are necessary in every state.

B. There Must Be Prompt Assignment of a Caseworker

1. Preventing Unnecessary Removals

Adequate practice requires that agencies assign a caseworker "immediately after a report or referral concerning a child who may be neglected or abused." CWLA, Standards for Child Protective Service, supra p. 23, § 2.7. See also, CWLA, Standards for Own-Home Service, supra p. 23, § 3.1; B. McGowan & W. Meezan, supra p. 24, at 298. It is the duty of the caseworker to determine the nature of the risks facing the child, to determine whether services might reduce those risks, to link the child and family to specific services, and to ensure that the services actually reach the child and family. See J. Kinney, D. Haapala & C. Booth, Keeping Families Together, the Homebuilders Model 23 (1991); B. McGowan & W. Meezan, supra p. 24, at 302. All of these tasks are connected, and none of them can be performed unless the agency assigns a caseworker. Thus, the need for prompt assignment of a caseworker is obvious; unless a caseworker is available, many unnecessary removals will occur.[10]

In conducting the initial investigation, an agency may assign one of its own workers, purchase casework services from a private agency, or develop an alternative method of case management. Moreover, a variety of approaches are appropriate when providing services to prevent removal. Although various approaches operate from different

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[10] This is exactly what happened prior to passage of the AACWA. See supra pp. 8-12.

theoretical models, they are all premised upon the ongoing, active involvement of a caseworker.[11]

The availability of a caseworker also is critical to preventing removal in those situations where a child is left at home following initial investigation. As just indicated, removal often can be prevented by the prompt delivery of services to the parents, for example homemaker services, counseling, or drug treatment. However, many parents need regular support in using these services; they also need a caseworker to ensure that the service actually is provided. This caseworker must begin providing help immediately, since "[s]ocial worker assistance is more likely to succeed where immediate follow-up occurs after a referral." CWLA, Standards for Child Protective Service, supra p. 23, § 2.6. Absent such activities by the caseworker, the home situation may deteriorate, necessitating the child's removal.

2. Facilitating Reunification

When a child is removed from the home and placed in temporary protective custody, prompt action by a caseworker is essential to facilitate reunification. NASW Standards, supra p. 23, Standard 25. Parents are particularly receptive to social work intervention and supportive services at a point of crisis. See J. Kinney, D. Haapala & C. Booth, Reaching High Risk Families 41 (1990). And for children placed in emergency foster care, the agency caseworker is often the only line of connection between parent and child. When there is a delay in the assignment of a caseworker, parents will be unable to

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[11] Because states retain wide discretion in how they choose to exercise the casework function, the concern of Amici Louisiana, et al., that states will lose opportunities to experiment is misplaced. Brief for Amici States of Louisiana, et al. at 8-9. The Solicitor General's concern about a lack of uniformity among theoretical approaches is similarly misconceived. Brief for the United States as Amicus Curiae at 32 n.15.

contact their children, or learn even the most basic information about their children's well-being. Parents discouraged from the outset by their inability to gain information or attempt to plan for their children's return are more likely to approach any subsequent agency efforts at reunification with skepticism. See, e.g., Hess & Folaron, Ambivalences: A Challenge to Permanency for Children, 70 Child Welfare 403 (1991).[12]

A caseworker acting promptly also may be able to locate a relative who will take custody of the child, or who can mobilize extended family members to assist the parent and child, easing the way for prompt reunification. At the same time, the worker is evaluating the risks to the child, developing services to control or eliminate those risks, and working out a plan with the family to facilitate a return of the child to the parent.

If a child is not returned immediately to the parent, the caseworker is also responsible for promptly developing and implementing a visitation plan for child and parent. This, too, facilitates reunification, since there is evidence that visitation between parent and child is a significant predictor of the likelihood of reunification, and that frequency of caseworker contact is associated with greater frequency of visiting. D. Fanshel & E. Shinn, supra p. 8, at 85-110. Visitation also is critical to promoting the child's well-being; it helps to maintain

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[12] In addition to their duties with regard to reunification, caseworkers perform functions essential to protecting the child's physical and emotional well-being. The caseworker helps both children and parents deal more effectively with the feelings of separation and depression which often accompany a child's removal from the home. The caseworker also helps reduce the child's sense of isolation, by enrolling the child in school, obtaining medical care or other treatment, and facilitating visits among separated siblings. Thus, the failure of an agency to assign workers promptly jeopardizes the well-being of the children who are supposedly being helped.

the psychological bond between parent and child and reduces the child's anxiety. NASW Standards, supra p. 23, Standard 25.

C. There Must Be Continuous Assignment of a Caseworker

Continuous availability of a caseworker is essential to implementing the entire structure of the AACWA, in particular to ensuring that the case plan is implemented. See generally CWLA, Standards for Organization and Administration for all Child Welfare Services, supra p. 23; NASW Standards, supra p. 23.

As discussed above, when children are left in their families, the absence of a continuously available caseworker may result in the failure to provide services and, as a consequence, the ultimate removal of the child. When a child is in foster care, continuous casework service is essential to facilitating reunification and preventing foster care drift. For example, a caseworker is needed to arrange transportation, monitor visits, or reschedule visits when conflicts arise. When the case plan calls for counseling, the caseworker must assist by making referrals, providing information to the counselor, and monitoring progress. Any break in the continuity of case coverage brings to a halt the coherent implementation of the case plan. Moreover, the caseworker often represents the only agency point of contact through whom a parent can shape case planning, ask questions, or seek assistance.

In addition, juvenile and family court judges measure a parent's progress in reference to their obligations as set forth in the case plan. It is particularly important that the caseworker update and monitor implementation of the case plan that will be used by the court at the 18-month dispositional review to establish the long-term goal of the case.

42 U.S.C. § 675(5)(C). This can be done adequately only if there is a continuously available caseworker.

No professional standard tolerates gaps in casework coverage. A social worker should be transferred from a case only when necessary, and with sufficient time, planning and preparation to prevent damage to the child and family as much as possible. If a caseworker must leave a case, the Child Welfare League of America advises that the case be staffed jointly by a new and old worker for a brief period of time to ensure continuity. See CWLA, Standards for Own-Home Service, supra p. 23, § 4.33; CWLA, Standards For Foster Family Service, supra p. 23, §§ 2.1, 3.4, 4.27.

CONCLUSION

In sum, the child welfare professions provide clear standards against which courts can measure a state's systemic compliance with the reasonable efforts requirement. The standards established by national organizations and child welfare experts are concrete, comprehensive and consistent. They are the basis for state plans throughout the country. They certainly provide a basis for judicial enforcement of the AACWA's requirements.

As organizations involved with the delivery of services to children in their own homes, in substitute care, and in adoptive homes, amici reaffirm the importance of states' ensuring that reasonable efforts are made to maintain and reunify families. The requirement is at the heart of the national child welfare policy embodied in the AACWA. Abused and neglected children are the most vulnerable people in our society. They deserve, and require, the full implementation of laws enacted to protect them. This will occur only if federal courts enforce these rights.

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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